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Hot Topic

"Future Worker
Management"

TESTIMONY BEFORE THE
COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS
September 29, 1994

By
Nelson Carrasquillo, Executive Director
COMITE DE APOYO A LOS TRABAJADORES AGRICOLAS (CATA)
(Farmworkers Support Committee)

Alternative Dispute Resolution and Agricultural Workers

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El Comité de Apoyo a los Trabajadores Agrícolas ("CATA" or the "Farmworkers Support Committee") is a grassroots, membership organization founded by farmworkers in 1979 that uses popular education methodology to organize agricultural workers in Puerto Rico, New Jersey, Pennsylvania, North Carolina and Mexico. We support workers in their struggle to organize along self-determined paths. Occasionally, these paths have led to support for developing labor unions. Often they have led to involvement in the disputes between workers and their employers.

The Commission has scheduled this session to deal with the topic of "alternative forms of dispute resolution at the workplace and in the application of employment laws." We have requested this opportunity to testify in order to express serious reservations about the appropriateness of most alternative dispute resolution proposals for agricultural workers.

In particular, we strongly object to any final Commission recommendation that would suggest that federal or state laws creating public rights could be waived or altered by private agreements. Commission on the Future of Worker-Management Relations *Fact Finding Report*, May 1994 pp. 116-119, 125-127 (hereinafter referred to as "*Report*").¹

As will be discussed more fully below, the principal federal protective statutes affecting farmworkers economic lives on a daily basis are the Migrant and Seasonal Agricultural Worker Protection Act ("AWPA"), 29 U.S.C. §1801 *et seq.* and the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §201 *et seq.* The AWPA includes a specific provision guaranteeing that:

"Agreements by employees purporting to waive or to modify their rights under this Act shall be void as contrary to public policy...."
29 U.S.C. §1856. The Commission has noted the effect of *Barrentine v. Arkansas-Best Freight System*, 450 U.S. 728 (1981) on the non-waiver of rights under the FLSA. *Report*, p. 116.

Similarly, it is our experience that "Ombudsman" systems as applied to the agricultural workplace, are only new and more sophisticated control mechanisms for agricultural employers, rather than positive humanistic developments that should be supported and encouraged. We believe that the Commission should express significant reservations about such systems in the context of unorganized workers. *See Report* pp. 119-121.

ALTERNATIVE DISPUTE RESOLUTION PROCEDURES

Any evaluation of the merits of alternative dispute resolution procedures for agricultural workers can only occur against the backdrop of the historical imbalance of power between agricultural employers and their employees. It is for that reason it is critical to understand the nature of the relationship between farmworkers and their employers and farm labor contractors before discussing proposals for alternative dispute resolution.

Farmworker organizations and advocates do not uniformly reject all forms of voluntary alternative dispute resolution, but we would vehemently reject any proposal for changes in law guaranteeing farmworkers full and appropriate access to federal courts.² This must include the right to immediate access to federal courts for appropriate injunctive remedies under the AWP.

² Legal Services programs representing farmworkers in Pennsylvania and in North Carolina, amongst others, have explored some forms of voluntary alternative dispute resolution with at best mixed results. However, such voluntary exploration of appropriate alternative dispute resolution approaches is far different from any mandate from this Commission or federal law that such approaches must be employed.

The AWP already includes provisions permitting attempts to resolve matters before commencing litigation in court as an element to consider in the amount of statutory damages to be assessed. 29 U.S.C. §1854(c)(2). This is a more than sufficient incentive to encourage development of appropriate **voluntary** alternative dispute resolution procedures.

Changes in federal law which would prevent farmworkers from pursuing claims (including claims for injunctive relief) under the AWP until exhaustion of administrative remedies or alternative dispute mechanisms have been vigorously opposed by farmworker advocates. *See, Hearings July 13, 1987* before the Subcommittee on Labor Standards of the House Committee on Education and Labor, House of Representatives, 100th Congress, 1st Session (Serial No. 100-50) and in particular testimony of Arthur N. Read. Effective injunctive remedies for violations of the AWP are a key and important aspect of the legal framework for protection of farmworker's rights.

Status of Protection for the Rights of Agricultural Workers

U.S. Labor Secretary Robert B. Reich stated in reference to the May 1994 draft *Report of this Commission*:

"The American Workplace has undergone extraordinary transformations over the last six decades and will be evolving still more dramatically in the future, but our legal framework and many of our notions about worker-management relations were made for a 1930's world -- not the 21st century."³

Unfortunately, for most farmworkers in this country labor relations have not yet evolved to the level of labor rights of most other workers in the 1930's. The "enlightened" search for a 21st century approach to labor relations must not ignore the unintended effects of such changes on the nation's agricultural work force.

Federal law continues to deprive agricultural workers of the same federally protected rights to engage in concerted protected activities, to engage in self-organization, and to compel employers to recognize unions selected by a majority of workers at a workplace that virtually every other category of worker receives at least on a theoretical basis.⁴

The federal Commission on Agricultural Workers in November 1992 found that:

"Farmworkers face special problems if they attempt to organize and bargain collectively in order to improve their working conditions. Effective

³ USDL News Release 94-277, June 2, 1994.

⁴ 29 U.S.C. §152(3) defines an employee protected under the National Labor Relations Act as excluding "...any individual employed as an agricultural laborer..." See, discussion of legislative history by the Commission on Agricultural Workers, *Report of the Commission on Agricultural Workers*, Report, p. 14-15 (November 1992).

The exclusion of mushroom workers and other indoor workers in horticultural specialties from protection under the National Labor Relations Act is only the result of appropriations riders to the National Labor Relations Act beginning in 1946 which required the NLRB to utilize the Fair Labor Standards Act definition of agricultural workers. See, *Michigan Mushroom Co.*, 90 NLRB 119, 26 LRRM 1279 (1950) holding that a 1946 appropriate rider required the NLRB to utilize the Fair Labor Standards definition of agriculture and that therefore mushroom workers had no protected rights under the NLRA. Prior to 1946 such workers had protected rights under the NLRA. Compare: *Matter of Park Floral Company*, 10 NLRB 404 (1940) (cultivation of horticultural specialties under artificial conditions not agricultural labor exempt under the NLRA); *Great Western Mushroom Company*, 27 NLRB 352 (1940) (mushroom harvesting laborers not agricultural labor exempt under the NLRA); *Knaust Brothers, Inc.*, 36 NLRB 915 (1941); *Indiana Mushroom Company*, 60 NLRB 1064 (1945); *Matter of Pepeekeo Sugar Company*, 59 NLRB 1532 (1945).

organizing is made more difficult by the fact that farmworkers are essentially powerless, both in objective terms and relative to the agricultural employers who oppose organizing. The powerlessness is compounded by the explicit exclusion of agricultural employees from legislation designed to afford U.S. workers this basic right."⁵

The Commission on Agricultural Workers adopted as one of its final recommendations that:

"Farmworkers should be afforded the right to organize and bargain collectively, with appropriate protection provided to all parties."⁶

The nature of the political power of agricultural employers is that such a recommendation is unlikely to be implemented in the foreseeable future.

CATA has been active in New Jersey and Puerto Rico where local constitutional protection recognize the rights of agricultural workers to organize unions and engage in collective bargaining. Similarly, in Pennsylvania such protection have been recognized as applying to the mushroom industry where CATA has been active, although other agricultural workers have no such protection.

Unfortunately, even labor laws theoretically protecting rights to organize with weak and ineffective remedies are incapable by themselves of changing the basic power relationship between agricultural employers and their workers. The Commission on Agricultural Workers concluded in analyzing the status of union activity amongst farmworkers:

"Underlying all these issues, however, is the labor supply. When actual or potential strikers, or even workers deemed to be 'trouble-makers,' can be replaced easily, the likelihood of successful organizing declines. Occupations with few entry requirements and many available workers are always difficult to organize. This has been the case with agricultural field work in recent years."⁷

The largest numbers of hired farmworkers are employed in fruit, vegetable and horticultural ("FVH") operations. The Commission on Agricultural Workers in November 1992 observed:

⁵ Commission on Agricultural Workers, *Report of the Commission on Agricultural Workers*, Report, p. 136 and Executive Summary, p. 11 (November 1992).

⁶ Commission on Agricultural Workers, Chapter IX Recommendations (November 1992). *Id*

⁷ Commission on Agricultural Workers, *Report of the Commission on Agricultural Workers*, Report, p. 112 (November 1992).

"The business of growing FVH products has changed dramatically over the past few decades. The number of small entrepreneurs running independent farming operations has shrunk. And while the majority of FVH farms continue to be classified as small, family-run operations, large, corporate agri-businesses have increased their domination of the industry, accounting for the majority of acreage and production and employing most of the farmworkers.

"At the same time, the industry itself is becoming vertically integrated. Packing houses and processing companies coordinate and control decisions ranging from the crop variety and timing of the planting to the final price a grower will receive. As a result, these larger farms and a maze of corporate structure, government agencies, financial institutions, and attorneys shape individual growers' business decisions."⁸

The Commission on Agricultural Workers found that the predominate role of government in relationship to American agriculture has been "to promote and protect agriculture."⁹ The Commission on Agricultural Workers noted:

"Farming, farmers, and farmworkers, however, have been granted a special status. This status has been based on the premise that U.S. agriculture, consisting largely of family farms, is as much a way of life as a business. However, only a few segments of the agricultural industry today exhibit a structure and organization that differs markedly from that of other businesses. This is particularly true in the case of fruit, vegetable and horticultural production."¹⁰

The Commission on Agricultural Workers estimated that there are approximately 2.5 million hired agricultural workers in the United States. In terms of ethnic composition of that workforce, the Commission on Agricultural Workers concluded:

"A large majority of seasonal farmworkers in the United States are of Latin origin. A smaller proportion, though still a majority, are foreign-born. The NAWS ["National Agricultural Worker Survey"] refers to the process by which this has occurred as the "latinization" of the farm labor force. In 1990, 70 percent of all SAS ["seasonal agricultural service"] workers were foreign-born; 51 per cent of those were SAWs ["Special Agricultural Workers"]. In more recently established immigrant-receiving areas, primarily the midwest (excluding Texas) and the East

⁸ Commission on Agricultural Workers, *Report of the Commission on Agricultural Workers*, Report, pp. 2-3 (November 1992).

⁹ Commission on Agricultural Workers, *Report of the Commission on Agricultural Workers*, Report, p. 26 (November 1992).

¹⁰ Commission on Agricultural Workers, *Report of the Commission on Agricultural Workers*, Report, p. 26 (November 1992).

(excluding Florida), only 36 percent of the SAS work force was foreign born; 45 percent of those were SAW's. Although there are fewer immigrant and Latino farmworkers in the new receiving areas, workers there are younger and more likely to be post-IRCA (unauthorized) immigrants than in the established areas."¹¹

CATA has been principally active in the East Coast of the United States, where the labor force has become increasingly composed of Mexican born nationals, a large percentage of whom are undocumented. The Commission on Agricultural Workers found:

"Until very recently, east coast agriculture had relied on its own sources of farm labor. For example, European immigrants in the 1920's, were employed extensively in New Jersey truck farming, while Appalachian whites were recruited for the New York apple harvest, and southern born African-Americans made up the bulk of the farm labor force in Delaware and Maryland. Puerto Rican workers replaced many of these groups.

"The large-scale dispersion of Mexican-born workers into eastern U.S. labor markets did not begin until the 1960's. While there were influxes of Haitian workers in the early 1980s and Guatemalan workers in the mid-1980s, by the end of that decade, Mexicans had become the largest single immigrant group in South Florida as well as throughout much of the East Coast."¹²

In addition, to the increasing participation of Mexican nationals in the labor force throughout the northeastern United States, this region has also developed significant local labor forces of Southeast Asian refugees performing agricultural labor, principally from the Cambodian, Vietnamese and Laotian communities especially in the Philadelphia and New York City areas. Many agricultural employers continue to consciously utilize workers from different ethnic communities, particularly with linguistic barriers between them, in order to prevent collective actions by the work force.¹³

As noted by the Commission on Agricultural Workers a significant percentage of the foreign-born work force in the Eastern United States consists of undocumented ("unauthorized")

¹¹ Commission on Agricultural Workers, *Report of the Commission on Agricultural Workers*, Report, p. 73 (November 1992).

¹² Commission on Agricultural Workers, *Report of the Commission on Agricultural Workers*, Report, p. 44 (November 1992).

¹³ For example, in 1993 in a strike in the Pennsylvania mushroom industry against an employer with a predominately Mexican workforce, the employer recruited farm labor contractors from the Cambodian and Vietnamese communities to supply replacement workers.

immigrants.¹⁴ It is expected that the North American Free Trade Agreement (NAFTA) will increase the number of undocumented Mexican nationals in the labor force. The Commission on Agricultural Workers reported that:

"While economic development efforts can in the long run, decrease migrant flows, the immediate impact is likely to be the further stimulation of migration out of rural, peasant villages into labor demand areas, wherever those may be. Implementation of a North American Free Trade Agreement (NAFTA) will likely have just that impact. While NAFTA ultimately may decrease migration pressures from Mexico, the immediate impact is likely to be one of increased population movement out of rural villages, continued overcrowding in Mexico's cities, and further "stage migration" -- first to areas of economic growth in northern Mexico and then into the United States."¹⁵

One of the results of the Immigration Reform and Control Act of 1986, has been that undocumented workers are afraid to assert their legal rights to even such things as minimum wages or housing provided by employers or farm labor contractors which meets minimum standards for habitability. Some employers are clearly aware that their workforce includes such undocumented foreign-born workers and consciously exploit the vulnerability of that workforce.¹⁶

Farm labor contractors continue to play a uniquely important role in the recruitment

¹⁴ Commission on Agricultural Workers, *Report of the Commission on Agricultural Workers*, Report, p. 73 (November 1992).

¹⁵ Commission on Agricultural Workers, *Report of the Commission on Agricultural Workers*, Report, p. 86 (November 1992).

¹⁶ The Immigration and Naturalization service in 1979 had proposed to amend its operating instructions to specifically recognize the rights of persons pursuing legal claims to remain in the United States as a litigant pending the outcome of those claims. These changes were never formalized. It would be critical for the Department of Labor to establish procedures with the Immigration and Naturalization Service for undocumented workers whose legal rights have been violated to obtain employment authorization and be placed under voluntary departure status ("docket control") while such persons pursued their legal rights. Numerous court decisions have recognized that such undocumented workers must have the right to pursue claims under protective statutes. See: *In re Reyes*, 814 F.2d 168 (5th Cir. 1987), *cert. denied*, *Griffin & Brand of McAllen, Inc. v. Reyes*, 487 U.S. 1235 (1988) ("AWPA protection apply to both documented and undocumented workers"); *Patel v. Quality Inn South*, 846 F.2d 700 (11th Cir. 1988), *cert. denied*, 489 U.S. 1011 (1989) (FLSA rights available to undocumented employees). However, as a practical matter undocumented workers place themselves at risk to deportation (or prosecution for use of false documents) if they pursue such claims.

and provision of much of the agricultural labor force throughout the Eastern United States. These "middlemen" have long been blamed for some of the most gross abuses of farmworkers, including situations in which workers have been held in peonage or slavery. Indeed, in some areas of the Eastern United States the changing sources of labor supply have increased the role of farm labor contractors in the recruitment and provision of labor. Farmworkers supplied through farm labor contractors may have to fear not only economic reprisals for assertion of employment rights, but may have to fear physical reprisals as well.

ALTERNATIVE DISPUTE RESOLUTION OF LEGAL CLAIMS

1. Basis for Refusing to Allow Waiver of Publicly Created Rights

The May 1994 draft *Report* of this Commission appears to come dangerously close to suggesting that the well established public policy and legal precedents that laws creating public rights could not be waived or altered by private agreement should be reconsidered.¹⁷ This would be disastrous in the context of agricultural workers and other unorganized low-paid workers.

As was noted above the principal federal protective statutes affecting farmworkers economic lives on a daily basis are the Migrant and Seasonal Agricultural Worker Protection Act ("AWPA"), 29 U.S.C. §1801 *et seq.* and the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §201 *et seq.* Each of which has been explicitly recognizing as barring waiver of rights thereunder by employees. In addition, farmworkers are affected by statutes relating to employment discrimination and to health and safety in the workplace.

The United States Supreme Court in the context of the FLSA minimum wage protection stated in 1945:

"It has been held in this and other courts that a statutory right conferred on a private party, but affecting the public interest, may not be waived or released if such waiver or release contravenes the statutory policy....Where a private right is granted in the public interest to effectuate a legislative policy.

¹⁷ The *Report*, at pp. 117-118, appears to suggest that the narrow holding in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) should be given greater scope. As the Commission appropriately notes (footnote 16, page 117), *Gilmer v. Interstate/Johnson Lane Corp.*, *supra*, involved arbitration of claims of a registered securities representative under a registration agreement with the New York stock exchange. The level of imbalance in the power relationship between "master" and "servant" inherent in the position of such a relatively well off and privileged employee, simply cannot be compared to the power relationship between an agricultural employee and his, or her, employer or farm labor contractor.

waiver of a right so charged or colored with the public interest will not be allowed where it would thwart the legislative policy which it was designed to effectuate.¹⁸

* * *

"The legislative debates indicate that the prime purpose of the legislation was to aid the unprotected, unorganized and lowest paid of the nation's working population; that is those employees who lacked sufficient bargaining power to secure for themselves a minimum subsistence wage."¹⁹

* * *

"Moreover, the same policy which forbids employee waiver of the minimum statutory rate because of inequality of bargaining power, prohibits these same employees from bargaining with their employer in determining whether so little damage was suffered that waiver of liquidated damages is called for."²⁰

That same inequality of bargaining power continues unabated for agricultural workers throughout the nation and is reflected in the 1983 Congressional enactment of the Migrant and Seasonal Agricultural Worker Protection Act ("AWPA") which contains explicit Congressional language barring "agreements purporting to waive or modify rights under this Act...."²¹

No system of employer mandated arbitration included within employment agreements of unorganized workers could ever reliably protect the publicly created rights of farmworkers.²²

¹⁸ See, *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697, 704 (1945).

¹⁹ *Id* at 707, fn. 18

²⁰ *Id* at 708

²¹ 29 U.S.C. §1856

²² The *Report*, at page 118, acknowledges:

"A crucial fact, of course, is that it is the employer that unilaterally develops the arbitration procedures that (nonunion) employees are contractually bound to use. That means that important quality standards should be met by such a private procedure before it may be enforced against a plaintiff with a public law claim. As the Supreme Court in acknowledged in *Gilmer*, if Congress or the courts have decided that it is in the public interest to guarantee employees certain fundamental rights, this policy judgement [sic] must not be evaded or diluted through private procedures that cannot fairly and effectively address employee claims that their rights have been violated."

Such due process judicial standards clearly exist in court proceedings, but no effective guarantee of them can be provided in private proceedings involving agricultural workers. Many agricultural workers do not speak English as their principal language and may not be fully literate

(continued...)

Moreover, absent equality of bargaining power between parties agreeing to arbitration of disputes other issues raised by the Commission should bar deferral to employer created arbitration procedures for any low-income workers including agricultural workers.²³

²²(...continued)

and educated in any language. Statutes such as FLSA and Title VII explicitly include provisions for attorney's fees for counsel in recognition of the fact that the amounts involved in such claims do not make it possible for private litigants to obtain assistance of competent counsel without such attorney's fees.

²³ See, *Report*, p. 119. Selection of arbitrators in the context of union and management labor arbitration is a process in which the economic strength of the union (or its attorneys) in decisions to refuse to make further use of arbitrators who are unfair to union grievance claims, acts as an effective policing mechanism on unfair and arbitrary decisions by such an arbitrator. No similar system, absent preserving findings of fact and conclusions of law of a private arbitrator for full plenary judicial review, could ever exist in the context of persons of unequal bargaining power. Indeed, it is one of the reasons why arbitration may be flawed for any claimant whose claim is not aggressively and actively supported by their union, even if, in satisfaction of its perceived duty of fair representation, the union provides a arbitration hearing for a claimant.

Low income persons could never effectively bear the costs of private arbitration (or even mediation) of claims. Due process might instead require the employer to provide effective counsel (and translation) for low income workers with claims, like minimum wage claims, for which attorney's fees are, and should be, available as a matter of law. Having employers bear the full costs of an arbitration system, further increases the non-neutrality of the process since all economic incentives for the arbitrator or arbitration service are not to destroy the goose that laid the golden egg.

Arbitration procedures which do not include the rights to discovery, depositions and subpoenas are another fundamental flaw of many arbitration (and mediation) procedures. Most private arbitration systems (unlike mediation arrangements) have procedures for subpoenas to be issued, but, particularly in the context of migrant farm workers and disputes with farm labor contractors and employers, the multi-state nature of the disputes involved make availability of full judicial discovery procedures critical.

Experience of farmworkers in Pennsylvania with alternative dispute resolution mediation procedures since 1987 has explicitly demonstrated that the absence of procedures to compel discovery of relevant information fundamentally flaws the efficacy of such proceedings.

No privately mandated arbitration provision not agreed to by parties without equal bargaining power should deprive the party not in control of the system (here the farmworker) of the right to file appropriate legal proceedings. Some alternative dispute resolution specialists have suggested exploration of such one-way binding arbitration proceedings. Limited **voluntary** exploration of such one-way binding procedures which do not deprive farmworkers of immediate access to courts in appropriate circumstances might be appropriate.

2. Alternative Dispute Resolution of Legal Rights of Farmworkers

a. The Glassboro Puerto Rican Contract

In 1980 the New Jersey Supreme Court eloquently analyzed the relative inequality of bargaining power of an agricultural employer and its employees. The Court refused to enforce contractual provisions in the written employment contracts of thousands of Puerto Rican agricultural workers in New Jersey. The Court held that unfair terms in such contracts should be viewed as contracts of adhesion and treated like unfair consumer contracts between uneducated consumers and large corporations.²⁴

²⁴ See, *Vasquez v. Glassboro Services Association*, 83 N.J. 86, 415 A.2d 1156 (1980). The Court there stated:

"A basic tenet of the law of contracts is that courts should enforce contracts made by the parties. However, application of that principle assumes that the parties are in position of relative equality and that their consent is freely given. See, *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 386 (1960). In recent years, courts have become increasingly sensitive to overreaching in contracts where there is an inequality in the status of the parties....

* * *

"A migrant farmworker has even less bargaining power than a residential tenant.

* * *

"The status of a worker seeking employment with Glassboro is analogous to that of a consumer who must accept a standardized form contract to purchase needed goods and services. Neither farmworkers nor consumers negotiate the terms of their contracts; both must accept the contracts as presented to them. In both instances, the contracts affect many people as well as the public interest.

"With respect to a standardized form contract, the intention of the consumer has been described as 'but a subjection more or less voluntary to terms dictated by the stronger party, terms whose consequences are often understood only in vague way, if at all.' Kessler, *Contracts of Adhesion--Some Thoughts About Freedom of Contract*, 43 Colum. L. Rev. 629, 632 (1943). After noting the 'gross inequality of bargaining position' between the parties in *Henningsen, supra*, 32 N.J. at 391, this Court stated that no meaningful consent had been given by the consumer to the terms of the contract. A contract one of where one party, as here, must accept or reject the contract does not result from the consent of that party. *Id* at 390. It is a contract of adhesion:

'There being no private consent to support a contract of adhesion, its legitimacy rests entirely on its compliance with standards in the public interest. The individual who is subject to the obligations

(continued...)

In the period after World War II, Puerto Rican workers were a principal element of the labor force in the Eastern United States, especially in New Jersey. Between 1948 and 1990, 427,604 Puerto Rican farmworkers were contracted for jobs in the United States, while additional thousands came without the benefits of government sanctioned work agreements.²⁵ Agricultural employers who complied with Puerto Rico's laws were required to sign employment contracts negotiated through the Puerto Rico Department of Labor.

In New Jersey an organization named Glassboro Services Association signed such employment contracts on behalf of its more than 500 members growers. These contracts contained nominal grievance provisions which in reality provided no protection to Puerto Rican workers who attempted to avail themselves of rights under the "Puerto Rican contract." However, the dependence of the Puerto Rican economy on such off-island migration left even the Puerto Rico Department of Labor as a paper tiger in attempting to enforce contract rights. The findings of fact in the grievance procedure simply involved Glassboro Service Association employer representatives writing their version of what occurred.²⁶ The grievance provisions of

²⁴(...continued)

imposed by a standard form thus gains the assurance that the rules to which he is subject have received his consent either directly or through their conforming to the higher public laws and standards made and enforced by the public institutions that legitimately govern him. [Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 Harv. L. Rev. 529, 566 (1971)]."

Vasquez v. Glassboro Services Association, 83 N.J. at 101-104.

²⁵ Commission on Agricultural Workers, *Report of the Commission on Agricultural Workers*, Report, p. 20 (November 1992).

²⁶ In its discussion of the facts in the case of the plaintiff in *Vasquez v. Glassboro Services Association*, *supra*, (which involved a dispute over the summary self-help eviction of a farmworker from housing without any due process), the New Jersey Supreme Court stated as to the contractual grievance situation:

"The contract provided that, if an employee was to be discharged, a hearing was to occur no later than five days after the employee was given notice of termination. The contract did not require a minimum amount of time to elapse between notice and termination of employment.

"The contract further provided for administrative review within the Puerto

(continued...)

the contracts, however, provided Glassboro Services Association with a shield against attempts to enforce contractual provisions by workers who had not exhausted their contractual grievance procedures.²⁷

Moreover, far from encouraging resolution of individual meritorious claims Glassboro Service Association taxed its members thousands of dollars each year for a legal defense fund that was used to fight virtually every legal claim filed by a Puerto Rican contract worker. In 1978, Puerto Rican contract workers employed the Farm Labor Contractor Registration Act ("FLCRA")²⁸, on a classwide basis to force Glassboro Service Association to comply with aspects of the Puerto Rican contract which they had refused to comply with.²⁹

The Puerto Rican contract experience demonstrates the absurdity for economically powerless farmworkers in relying upon a grievance system which is controlled by an

²⁶(...continued)

Rican Department of Labor whenever a worker had a complaint 'regarding the breach, application, interpretation or compliance' with the contract. If the Secretary of Labor determined that Glassboro had 'not adequately remedied the complaint,' the Secretary could represent the worker and sue Glassboro.

*

*

*

"According to Glassboro's foreman, Vasquez's work was not satisfactory. On July 19, 1976, the foreman told Vasquez that he was to be discharged. A few hours later Vasquez had his 'hearing' with the foreman and a field representative of the Puerto Rican Department of Labor. Thereafter the foreman decided to complete the discharge...."

Vasquez v. Glassboro Services Association, 83 N.J. at 97-98.

²⁷ Attempts in New Jersey state courts to enforce rights of Puerto Rican migrant workers on a classwide basis for common violations of contract were rejected in part because of a requirement to demonstrate individual exhaustion of administrative remedies.

²⁸ 7 U.S.C. §2041 *et seq.* This statute was the predecessor of the current Migrant and Seasonal Agricultural Worker Protection Act ("AWPA"), 29 U.S.C. §1801 *et seq.* which was enacted effective April 14, 1983.

²⁹ *Pachecho et al. vs. New Jersey Farm Bureau et al*, U.S. District Court, District of New Jersey, Civil No. 78-2763.

economically powerful agricultural employer. Grievance arbitration procedures under collective bargaining agreements have very different roles and functions that are related to the collective strength of a union. We can envision no circumstances under which surrendering public rights to a binding grievance or arbitration process would be in the interest of agricultural workers.³⁰

b. The Inadequacy of Government Agencies and Remedies

No effective alternative protection can exist for farmworkers in government administered agencies created to intervene in the disputes between farmworkers and their employers. These administrative agencies have uniformly failed, because of the greater economic weight and power of the agricultural community in the political sphere. Absence self-organization and empowerment of farmworkers, the United States Employment Service System and its Regional and State Monitor Advocates will continue to be ineffective agencies that only continue their historical roles of deference to the need of agricultural providers.³¹

c. Mediation in Pennsylvania

The Pennsylvania legal services program for migrant farmworkers, Friends of Farmworkers, Inc., has several years worth of experience with an alternative dispute resolution mediation program for migrant farmworkers in the tomato harvesting region of northeastern Pennsylvania. Considerable effort was expended in the structuring of a formal mediation

³⁰ The Commission's *Report*, at pp. 113-114, notes that alternative dispute resolution procedures must include: (i) necessary due process procedures; (ii) neutrals with sufficient substantive expertise to warrant deference to their decisions by the public agencies and courts responsible for the laws involved. Unfortunately, this last category is one of the areas where arbitration of employment disputes between farmworkers and their employers is likely to be singularly deficient. There simply is not a body of neutrals with knowledge and experience in the areas of farmworker rights covered by laws, such as the Migrant and Seasonal Agricultural Worker Protection Act ("AWPA"), 29 U.S.C. §1801. Moreover, the existing administrative enforcement mechanisms of the United States Department of Labor (which provide no remedies for injured workers) are far slower than the judicial system.

³¹ As an example, a local job service representative in Pennsylvania testified that in conducting inspections of a farm labor camp he lied about the dimensions of rooms so as to allow the number of persons who had been permitted under state issued farm labor camp permits to continue to live in such quarters. There has been extensive litigation over the failures of the United States Employment Service system over the last 20 years.

program involving law school professors. However, experience with that program does not suggest that it is appropriate as a larger scale mandatory model.³²

Amongst the troubling experiences reported by farmworkers who attempted to utilize the Pennsylvania mediation program were instances of physical retaliation by persons believed to be connected with farm labor contractors against workers who attempted to assert rights under the in-season dispute resolution aspects of the program.

To the extent that the experience with the Pennsylvania mediation system can provide more general guidelines it continues to be that the only successes of the mediation system to date have been in a context where the power of farmworkers lays in the strength of their alternative legal remedies in court. It does not provide any effective alternative to readily available legal remedies for farmworkers.

2. OMBUDSMEN

Farmworkers in states where CATA is active have had extensive experience with various "ombudsmen" programs. We cannot join the Commission in expressing even cautious optimism about the positive potential for such systems in the context of agricultural workers.

A good "ombudsmen" performs no more effective task than a good personnel office in a large business. This is not a major positive development for alternative dispute resolution at least as it has developed in our experience.

Unfortunately, in the context of the powerlessness of farmworkers in relationship to their employers and farm labor contractors, "ombudsmen" in our experience are often only a further means of control of farmworkers. Such "ombudsmen" are frequently explicitly intended to prevent farmworkers from engaging in the kind of self-organization that is fundamental to changing the nature of the power relationship between farmworkers and their employers.

Farmworkers must be protected from persons who deceive them with claims of independence from their employers, but who, in fact, are nothing more than agents paid by and acting in the interest of the employers.

³² Interestingly, although agricultural employers in Pennsylvania and other states have long insisted that they are interested in alternative dispute resolution, no farmers outside of six large growers in a two county area have expressed any interest in applying the mediation of dispute model to disputes in other areas of the state involving larger numbers of farmworkers.

Farmworkers have reported: (1) being pressured by "ombudsmen" to refrain from pursuing criminal assault or disorderly conduct charges against farm labor contractors who have assaulted them at work on the job; (2) being told by "ombudsmen" that God would not want them to pursue claims against their employers or farm labor contractors; (3) threatened with retaliation for pursuing claims against their employers; (4) being recruited to work as strike breakers during a labor dispute by "ombudsmen" working for groups of mushroom growers. Moreover, "ombudsmen" working for multiple employers offer sophisticated opportunities for systematic "blacklisting" of workers who are perceived trouble makers.³³

"Ombudsmen" are also involved in the development of worker committees at workplaces where union organizing has occurred in order to discourage and undercut collective action and organization by workers.

We would strongly urge the Commission to refrain from any generalized endorsement of so-called "ombudsmen" systems.

CONCLUSION

We believe that the Commission should refrain from endorsing forms of alternative dispute resolution as mandatory alternatives to judicial enforcement of publicly created statutory rights.

We believe that the Commission should recognize that farmworkers must be empowered and engage in collective actions in order to change the imbalance of the power relationships between themselves and their employers. This should be the appropriate focus for Commission recommendations affecting such unorganized workers.

The Commission should not endorse proposals for alternative dispute resolution that will further undermine opportunities for self-organization of unorganized workers.

³³ Some "ombudsmen" have been involved in the development of job applicant questionnaires intended to identify relatives who may have been involved in labor disputes or complaints at other operations.